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Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON; TONY S. LEE; HERBERT N. HARMON; ROBERT F. CONDON; ELBERT SHORE; AND MCGUIREWOODS LLP,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE TWO JANUARY 23, 2008 ORDERS

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Questions Presented for Review

1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; 2) Johnson sought to enter into a contractual relationship with the defendant(s); 3) **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; and 4) **Johnson was refused or denied the goods or services** that w[ere] otherwise afforded to nonwhite customers. Johnson is entitled to the same protections of law and benefits of law that are commonly afforded to other similarly situated litigants who are litigating cases before the United States Court of Appeals for the District of Columbia Circuit, yet he was denied the same protections of law and benefits of law that have been afforded to other similarly situated litigants.

1) Other litigants are permitted to utilize FRAP 40 to redress "each point of law or fact that the petitioner believes the court has overlooked or misapprehended; do the January 23, 2008 ORDERS of the United States Court of Appeals refusing to allow Johnson to proceed against the Defendants/Appellees pursuant to FRAP 40 deny Johnson equal protection of law, or equal benefits of law?
2) Does the denial of the appointment of a court appointed attorney, deny Johnson equal protection of law, or equal benefits of law?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia Circuit.

The Petitioner here and Plaintiff – Appellant below is Kenneth W. Johnson.

The Respondents here and Defendants – Appellees below are Jesse Gadson, Tony S. Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, McGuireWoods LLP.

CORPORATE DISCLOSURE STATEMENT

Kenneth W. Johnson is a person, an individual, a human being, and therefore, is not a corporation. There is no parent or publicly held company owning 10% or more of any corporate stock, a statement to this effect shall be included on this page. Supreme Court Rule 29.6.

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JURISDICTIONAL STATEMENT

On January 23, 2008, the United States Court of Appeals for the District of Columbia Circuit issued two ORDERS that stated the following:

"Upon consideration of appellant's petition for rehearing, and the motion for appointment of counsel, it is ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is FURTHER ORDERED that the petition for rehearing be denied. Per Curiam"

"Also, on Jan 23, 2008, the United States Court of Appeals for the District of Columbia Circuit issued an EN BANC ORDER that stated the following: "Upon consideration of appellant's petition for rehearing en banc and his motion requesting that Judge Rogers request a vote, and in the absence of a request by any member of the court for a vote, it is ORDERED that the petition be denied. Per Curiam"

Johnson could not raise a question in the "Question Presented" page of the January 9th 2008 Petition for Writ of Certiorari that dealt directly with the two January 23rd 2008 Orders of the United States Court of Appeals for the District of Columbia Circuit, because the January 23rd 2008 Orders HAD NOT BEEN ISSUED until after Johnson had filed the January 9th 2008 Petition for a Writ of Certiorari in No. 07-907.

Jurisdiction to review the two January 23rd 2008 Orders of United States Court of Appeals for the District of Columbia Circuit is conferred to the Supreme Court of the United States by Title 28 U.S.C. § 1254. Johnson has 90 days from the date the January 23rd Orders of the United States Court of Appeals for the District of Columbia Circuit were issued to seek review of those two ORDERS.

Federal Rule of Appellate Procedure 40(a)(2) states in pertinent part: "Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition."

On October 16, 2007, Johnson filed his Petition for Rehearing Pursuant to FRAP 40 in the United States Court of Appeals for the District of Columbia Circuit. Johnson filed his motion for court appointed council on October 23, 2007, and filed his Petition for Rehearing En Banc in that court on November 6, 2007. These documents are material to the January 23, 2008 ORDERS.

THE CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. § 1981:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

STATEMENT OF THE CASE

The U.S. District Court stated that Petitioner's Section 1981 claim failed because "Johnson's allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981."—Amended Memorandum Opinion at 7(September 20th 2006). The United States Court of Appeals for the District of Columbia Circuit affirmed this decision on October 9, 2007. Johnson alleged that he was racially discriminated against because he is a White man and was refused the legal services that were otherwise afforded to nonwhites. The fact that the Defendants saw him as white and treated him like a white man is not the issue; the fact that the Defendants refused Johnson the legal services that they afford to nonwhites customers is the issue.

On October 16, 2007, Johnson filed his, "Petition for Rehearing Pursuant to FRAP 40". Federal Rule of Appellate Procedure 40(a)(2) states in pertinent part: "Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition."

Johnson set forth in his "Petition for Rehearing Pursuant to FRAP 40" [t]he "point of law or fact that the petitioner believes the court has overlooked or misapprehended". At page 1, ¶1, the

October 16, 2007, "Petition for Rehearing Pursuant to FRAP 40" states:

> "Comes now, Kenneth W. Johnson and presents the following as the basis for granting the Petition. Johnson is a White man of mixed racial ancestry who alleges that he 'looks either Caucasian/European or predominately Caucasian/European';
> Johnson sought to enter into a contractual relationship with the defendant(s); Johnson met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; and Johnson was denied or refused the goods or services ordinarily provided by the defendants to other similarly situated customers; and Johnson was denied or refused the goods or services that w[ere] otherwise afforded to nonwhite customers."

Johnson is entitled to the same protections of law and benefits of law that are commonly afforded to other similarly situated litigants who are litigating cases before the United States Court of Appeals for the District of Columbia Circuit, yet Johnson was denied the same protections of law and benefits of law that have been afforded to other similarly situated litigants/Appellants. Other litigants/Appellants are permitted to utilize FRAP 40 to redress each point of law or fact that they believe the Court of Appeals has overlooked or misapprehended", yet Johnson was denied these

same protections of law and/or benefits of law, that have been afforded to other litigants/Appellants pursuant to Federal Rule of Appellate Procedure 40.

The January 23, 2008 ORDER of the United States Court of Appeals for the District of Columbia Circuit concerning the "Petition for Rehearing Pursuant to FRAP 40" states:

> "Before: Henderson, Tatel, and Kavanaugh, Circuit Judges
>
> ORDER
>
> Upon consideration of appellant's petition for rehearing, and the motion for appointment of counsel, it is
>
> **ORDERED** that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is
>
> **FURTHER ORDERED** that the petition for rehearing be denied.
>
> Per Curiam"

Johnson wants to challenge this January 23, 2008 ORDER of the United States Court of Appeals

for the District of Columbia Circuit, and does so herein this "Petition for a Writ of Certiorari to Review the January 23, 2008 ORDERS of the United States Court of Appeals for the District of Columbia Circuit". See "Questions Presented" p. i.

Johnson dose not except the denial of court appointed counsel; Johnson dose not except the court's basis for denying Johnson court appointed counsel; Johnson does not except the Court of Appeals [r]efusal to allow Johnson to proceed against the Defendants/Appellees pursuant to Federal Rule of Appellate Procedure 40.

Johnson does not except the denial of equal protections of law and equal benefits of law as alleged herein, and occurred on January 23, 2008, when the Court of Appeals issued its January 23, 2008 ORDERS "refusing" to allow Johnson to proceed against the Defendant/Appellees pursuant to FRAP 40.

On October 16, 2007, Johnson filed his Petition for Rehearing Pursuant to FRAP 40 in the United States Court of Appeals for the District of Columbia Circuit. Johnson filed his motion for court appointed council on October 23, 2007, and filed his Petition for Rehearing En Banc in that court on November 6, 2007. These documents are material to the January 23, 2008 ORDERS. Johnson asks that these documents be certified and transferred to the Supreme Court for review.

ARGUMENT

A. The issue of whether either of the two Jan 23, 2008, Orders of the United States Court of Appeals for the District of Columbia Circuit denying Johnson's Petition for Rehearing, and Petition for Rehearing En Banc deny Johnson equal protection of law and equal benefits of law, or in the alternative, conflict with a decision of the Supreme Court of the United States in either *Swierkiewicz v. Sorema*, 534 U.S. 506-515 or McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 274(1976), or Foman v. Davis, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222?

Johnson is entitled to the same protections of law and benefits of law that are commonly afforded to other similarly situated litigants who are litigating cases before the United States Court of Appeals for the District of Columbia Circuit, yet he was denied the same protections of law and benefits of law that have been afforded to other similarly situated litigants. Other litigants are permitted to utilize FRAP 40 to redress "each point of law or fact that the petitioner believes the court has overlooked or misapprehended". Federal Rule of Appellate Procedure 40(a)(2) states in pertinent part: "Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition."

Johnson pointed out to the United States Court of Appeals for the District of Columbia Circuit in his October 16, 2007, "Petition for Rehearing Pursuant to FRAP 40" that he could prevail against the Defendants under the following theory:

> "1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; (2) Johnson sought to enter into a contractual relationship with the defendant(s); (3) Johnson met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; (4) and Johnson was denied or refused the goods or services that w[ere] otherwise afforded to nonwhite customers."

Given that the United States Court of Appeals for the District of Columbia Circuit ruled against Johnson on October 9, 2007, Presumably, on the basis that Johnson is a White man and is not a racial minority, Johnson should have been allowed to proceed against the Defendants following his October 16, 2007 Petition for Rehearing pursuant to Federal Rule of Appellate Procedure 40. The fact that Johnson was not allowed to proceed against the Defendants/Appellees pursuant to FRAP 40 was a denial of equal protection of law and a denial of equal benefits of law.

The January 23, 2008 ORDER of the United States Court of Appeals for the District of Columbia Circuit concerning the "Petition for Rehearing Pursuant to FRAP 40" states:

> "Before: Henderson, Tatel, and Kavanaugh, Circuit Judges
>
> ORDER
>
> Upon consideration of appellant's petition for rehearing, and the motion for appointment of counsel, it is
>
> **ORDERED** that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is
>
> **FURTHER ORDERED** that the petition for rehearing be denied.
>
> Per Curiam"

Johnson wants to challenge this January 23, 2008 ORDER of the United States Court of Appeals for the District of Columbia Circuit, and does so herein this "Petition for a Writ of Certiorari to Review the January 23, 2008 ORDERS of the

United States Court of Appeals for the District of Columbia Circuit". See "Questions Presented" p. i.

In ruling against the contents of the Petition for Rehearing Pursuant to FRAP 40, United States Court of Appeals ruled against a firm act of law established by this Court in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), as well as, in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976). In *Swierkiewicz Id.* supra, the Petitioner, a 53-year-old native of Hungry, filed a lawsuit against the respondent, his former employer, alleging that he had been fired on account of his national origin in violation of Title VII of the Civil Rights Act of 1964 and on account of his age in violation of the Age Discrimination in Employment Act of 1967(ADEA). In affirming the District Court's dismissal of the complaint, the Second Circuit relied on its settled precedent requiring an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802. The Second Circuit held that petitioner had failed to meet his burden *because his allegations were insufficient as a matter of law to raise an inference of discrimination*. The Supreme Court of the United States reversed the Second Circuits holding and remanded the case for further proceedings consistent with its opinion: See *Swierkiewicz v. Sorema*, 534 U.S. at pages 506, 507 and 515(2002).

Here it is uncontroverted that the United States District Court for the District of Columbia as well as the United States Court of Appeals for the District of Columbia Circuit (by affirmance) held that Kenneth W. Johnson failed to meet his burden *because his allegations were insufficient as a matter of law to raise an inference of discrimination*, when they held Petitioner's Section 1981 claim failed because his "allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981". This holding is in direct conflict with the holding of the Supreme Court in *Swierkiewicz v. Sorema*, 534 U.S. at 506-507 and 5157(2002), where the Supreme Court reversed the United States Court of Appeals for the Second Circuit.

In *Swierkiewicz v. Sorema*, 534 U.S. at 506 the Supreme Court "*Held*: An employment discrimination complaint need not contain specific facts establishing a prima facie case under the McDonnell Douglas framework, but instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2). The *McDonnell Douglas* framework—which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination—is an evidentiary standard, not a pleading requirement. See, e.g., 411 U.S., at 800. The Court has never

indicated that the requirements for establishing a prima facie case apply to pleading. Moreover, the *McDonnell Douglas* framework does not apply where, for example, a plaintiff is able to produce direct evidence of discrimination. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121. Under the Second Circuit's heightened pleading standard, however, a plaintiff without direct evidence at the time of his complaint must plead a prima facie case of discrimination even though discovery might uncover such direct evidence. It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered. Moreover, the precise requirements of the prima facie case can vary with the context and were 'never intended to be rigid, mechanized, or ritualistic.' *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577. It may be difficult to define the precise formulation of the required prima facie case in a particular case before discovery has unearthed relevant facts and evidence. Consequently, the prima facie case should not be transposed into a rigid pleading standard for discrimination cases."—*Swierkiewicz v. Sorema*, 534 U.S. at 506 and 507(2002).

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 the Supreme Court held: "Section 1981 prohibits racial discrimination in private employment against white persons as well as nonwhites, and this conclusion is supported by the statute's language, which explicitly applies to "all persons," and by its legislative history. While the

phrase "as is enjoyed by white persons" would seem to lend some support to the argument that the statute is limited to the protection of nonwhite persons against racial discrimination, the legislative history is clear that the addition of the phrase to the statute as finally enacted was not intended to eliminate the prohibition of racial discrimination against whites."—*McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, at 274. "[T]here shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, ... shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other...."— *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, at 288.

Johnson first contentions are these: Johnson was clearly denied the "full and equal benefits of all laws and proceeding for the security of person and property" when the United States Court of Appeals for the District of Columbia Circuit [r]efused to allow Johnson to proceed against the Appellees/Defendants pursuant to FRAP 40. The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's

holding that Johnson is a White male on October 9, 2007.

Johnson pointed out to the United States Court of Appeals for the District of Columbia Circuit in his October 16, 2007, "Petition for Rehearing Pursuant to FRAP 40" that he could prevail against the Defendants under the following theory:

> "1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; (2) Johnson sought to enter into a contractual relationship with the defendant(s); (3) Johnson met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; (4) and Johnson was denied or refused the goods or services that w[ere] otherwise afforded to nonwhite customers."

And, Johnson [a]rgued in support of the October 16, 2007, Petition for Rehearing Pursuant to FRAP 40: "White males may also sue for racial discrimination as a matter of law: *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274 (1976). The Supreme Court of the United States held: 'Section 1981 prohibits racial discrimination in private employment against white persons as well as nonwhites'. Johnson is not required to allege all four element(s) of a prima facie case in

his Amended Complaint in order to survive a 12(b)6 motion. '....if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all elements of a prima facie case'—*Swierkiewicz* Id. supra."—October 16, 2007, Petition for Rehearing Pursuant to FRAP 40 at page 1.

Johnson pointed out in his October 16, 2007, Petition for Rehearing Pursuant to FRAP 40, that he is not required to plead the [e]ntire 4th element of the prima facie case for racial discrimination in order to survive the defendants' motion to dismiss, as a matter of law: "'This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.'—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002)."—October 16, 2007, Petition for Rehearing Pursuant to FRAP 40 at page 2.

It is clear that Johnson did not fail to plead elements 1 through 3 and part of 4 of the prima facie case for racial discrimination in the 6/9/2006 Amended Complaint, which establishes that: 1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; 2) that Johnson sought to enter into a contractual relationship with the defendant(s); 3) that **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to

other similarly situated customers (see the retainer agreements, e-mails, and other documents in the record at [R—181 through 207]); and 4) that **Johnson was refused or denied legal services.** Johnson is not required to plead the phrase: "that w[ere] otherwise afforded to nonwhite customers" in order to survive the defendant's motion to dismiss. See Swierkiewicz v. Sorema, 534 U.S. 506 through 515 (2002). "This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511.

"'In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all elements of a prima facie case."—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002). It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination ***is discovered***"—*Swierkiewicz* Id. supra at 506."—October 16, 2007, Petition for Rehearing Pursuant to FRAP 40 at page 2.

Johnson's second contentions are these: Johnson is not required to "demonstrated sufficient likelihood of success on the merits", as a prerequisite to getting a court appointed attorney, thus, Johnson should have been appointed counsel because he was never required to demonstrate a sufficient likelihood of success on the merits" at this stage of litigation. The Supreme Court in *Swierkiewicz v. Sorema*, 534 U.S. at 506 "*Held*: An employment discrimination complaint need not contain specific facts establishing a prima facie case under the McDonnell Douglas framework, but instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2). The *McDonnell Douglas* framework—which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination—is an evidentiary standard, not a pleading requirement. See, e.g., 411 U.S., at 800. The Court has never indicated that the requirements for establishing a prima facie case apply to pleading." Thus, Johnson was never required to demonstrate sufficient likelihood of success on the merits, as a precondition to getting a court appointed attorney to argue that he had not failed to state a claim upon which relief can be granted. A court appointed attorney would not have been required to show a sufficient likelihood of success on the merits, but only that Johnson had not failed to state a claim upon which relief had been granted in order to prevail on the appeal.

On January 23, 2008, the United States Court of Appeals for the District of Columbia Circuit issued an ORDER that stated the following:

"Before: Henderson, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, and the motion for appointment of counsel, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the petition for rehearing be denied.

Per Curiam"

Johnson met the requirements to be given a court appointed attorney, and should have been given one. The refusal to do so was a denial of equal protection of law and equal benefits of law. Johnson maintains throughout this case that he did not fail to state a claim upon which relief may be granted.

Simply put, Johnson would not be in the circumstances that he's in now if attorneys had taken the appropriate action a long time ago: Attorney Jesse Gadson, a Black attorney, stated to Kenneth Johnson's face, "You have no civil rights", because of the fact that Johnson is a White man of mixed racial ancestry. He does not think that Black people have no civil rights; he only thinks that Kenneth W. Johnson has no civil rights, because of the fact that Kenneth W. Johnson is a White man of mixed racial ancestry. Kenneth W. Johnson alleges in the Amended Complaint that Jesse Gadson told him to his face, "***You have no civil rights***". The allegation must be taken as true. See *Swierkiewicz v. Sorema*, 534 U.S. 506. The statement by Jesse Gadson: "***You have no civil rights***" falls in the category ***of discriminatory statements or attitudes*** on the part of the defendant. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc). Jesse Gadson's statement begs the question: What is it about Kenneth W. Johnson that makes Jesse Gadson think that Kenneth W. Johnson has no civil rights [?], which is what Gadson said. Jesse Gadson does not think his Black clients have no civil rights; he thinks that about Kenneth W. Johnson, because Johnson is a White man of mixed racial ancestry. Jesse Gadson refused Kenneth W. Johnson the legal services that a[re] outlined in the retainer agreement, which states in part:

"It is hereby agreed by and between Kenneth Johnson, (hereafter Client) and JESSE A. GADSON, ATTORNEY AND COUNSELOR AT

LAW, (hereafter Attorney), that in consideration of the retainer in the amount of $1,700.00 (non-refundable), said Attorney is hereby retained by the client to provide legal advice and representation, if necessary, regarding the following matter(s): To investigate the incident surrounding the police department role in closing the client business...." "Specifically Attorney agrees to investigate the possibility of filing a lawsuit against the District of Columbia government."—Record in U.S. Ct. of App. at [R–181].

Attorney Tony S. Lee and the law firm McGuireWoods LLP refused Kenneth W. Johnson the legal services that a[re] outlined in the retainer agreement, which states in part:

"Retainer and Contingency Letter Agreement Johnson v. District of Columbia Gov't et al.

Dear Ken: This is to confirm our understanding with you with respect to our representation of you ('Client') in connection with the above-reference subject matter.

1. Nature of Services. The services to be rendered by our firm include, but are not limited to, advice on the strategy and litigation for the above-reference case, preparation of all necessary pleadings and case materials, prosecution of the case at trial and, if applicable, on appeal, and any other matters on which we may be asked to provide legal counsel from time to time....

2. Fees. Client agrees to pay attorney's fees for professional services as follows: 25% of any settlement or recovery prior to trial, 33% of any settlement, recovery, or judgment once the trial has commenced, and 40% if the case is appealed."

Jesse Gadson or Tony Lee and his law firm McGuireWoods LLP were supposed to sue for the recovery of Johnson's livelihood and his commercial real property where he earned his livelihood, which he lost as a direct result of the actions of the District of Columbia government and its police. They were also supposed to sue for the "many" violations of Johnson's civil rights, inter alia.

B. The issue of whether Johnson was *deny equal protection of law and equal benefit of law* (continued).

What Johnson is saying is that by disobeying the Supreme Court's precedent in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222, the United States Court of Appeals for the District of Columbia Circuit has denied Johnson equal protection of law. When the United States Court of Appeals for the District of Columbia Circuit denied Johnson's Petition for Rehearing, or Petition for Rehearing En Banc, or appointment of council on January 23, 2008, it in effect denied Johnson equal protection of law and equal benefit of law, as previously discussed in Argument "A.".

Johnson was denied equal protection of law and equal benefit of law yet again, when the United States Court of Appeals for the District of Columbia Circuit denied Johnson's Petition for Rehearing, or Petition for Rehearing En Banc, or appointment of council on January 23, 2008. Discovery would have revealed that the Defendants offer their services to nonwhite customers, yet refused Kenneth Johnson. Johnson did not need to amend the Complaint to assert allegations that he was racially discriminated against, because those allegations were already present in the Amended Complaint. Johnson wanted to conduct discovery of the defendants, add additional allegations to the

Amended Complaint, and change certain language in the "Compensatory and Punitive Damages" portion of the Amended Complaint at page 101, while maintain the same amount for monetary damages that currently exist in the June 9th 2006 Amended Complaint at page 101.

Johnson has been denied the protections of law and the benefits of law that are spelled out in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222 or TITLE 42 U.S.C. § 1981 or Fed.Rules.Civ.Proc.Rules 15(a), 59(e), 60(b), 28 U.S.C.A. or *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc)!

Aka v. Wash. Hosp. Ctr.,, 156 F.3d at 1284, 1289(D.C. Cir. 1998) (en banc) holds: In attacking a defendant's explanation, a plaintiff is entitled to offer three categories of evidence: (1) evidence establishing the plaintiff's prima facie case; (2) evidence the plaintiff presents to attack the Defendant's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff; such as independent ***evidence of discriminatory statements or attitudes*** on the part of the Defendants. The explanations that the Defendants gave to Kenneth W. Johnson w[ere] merely pretext to hide [t]he racial discrimination against Johnson, because Johnson is a White man of mixed racial ancestry.

Tony Lee and McGuireWoods LLP were not "time-barred" from pursuing Johnson's claims of fraud upon the court, as a matter of law. "The only instance in which Rule 60(b) allows for the reopening of lawsuits regardless of the passage of time is when there is an allegation of fraud upon the court, for the law favors discovery and correction of corruption of the judicial process even more than it requires an end to lawsuits." *Lockwood v. Bowles*, D.C.D.C. 1969, 46 F.R.D. 625, 634.

The Supreme Court of the United States, itself, vacated a 1932 Judgment in 1944 that was attack in 1941 on the basis that the Judgment had be procure by way of "fraud upon the court" in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944). "Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial."— *Hazel* Id. supra at 250.

Numerous United States Courts of Appeals have held that "fraud upon the court" has no time limit. "...a decision produced by fraud upon the court is not in essence a decision at all and never becomes final" —7th Circuit, United States Court of Appeals, *Kenner v. Commissioner of the Internal Revenue*, 387 F.2d 689, 691, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112. See also the 2nd Circuit, U.S. App., *Serysko v. Chase Manhattan Bank*, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139; or the

10th Circuit, U.S. App., *Wilkin v. Sunbeam Corp.*, 405 F.2d 165; or the District of Columbia Circuit, U.S. App., 195 F.2d 774; or the 9th Circuit, U.S. App., *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 625, 640, citing Wright & Miller, affirmed C.A. 9th, 645 F.2d 699, certiorari denied 102 S.Ct. 976, 454 U.S. 1126, 71 L.Ed.2d 113." See WRIGHT-MILLER-KANE, Federal Practice and Procedure § 2870, pages 409-412.

The Superior Court for the District of Columbia's January 12, 2004 Order in Johnson v. District of Columbia, Civil Action 3837-98 states in pertinent part: "Where, as here, the plaintiff asks the court to vacate judgment due to fraud, he must show the following elements with respect to defendants' behavior: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action taken in reliance upon the representation. *Cobb v. Cobb*, 116 WLR 1993 (Super. Ct. 1998). Assuming the plaintiff proves all five of the above elements, the court may then set aside the earlier decree, even if the present case was filed well after the general year-long limitation. *Cobb v. Cobb* Id. supra is the vacate of a 1976 Judgment in 1998 for fraud upon the court.

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's federal civil rights claims by the D.C. Code 12-309 notice requirement, as a matter of law. See *Brown v. United States*, 239 U.S.App.D.C.345, 356-357 (en banc): "We hold that appellant's noncompliance

with 12 D.C. Code § 309 cannot bar his federal claims".

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's right to the recovery of his real property by D.C. Code 12-301(1). D.C. Code 12-301(1) allows a plaintiff a 15 year statute of limitation to recovery real estate that the plaintiff has lost as a direct result of the conduct of a defendant. The District of Columbia ran Johnson out of business, and close his business down through the uses of police power and governmental authority, causing Johnson to lose his real property when they destroyed the income that the business was producing by closing it down, so that, Johnson loss the income which enabled him to pay the $2,900.00 monthly payments on his commercial building.

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's federal civil rights claims by the "doctrine of equitable tolling". The elements for equitable tolling are, 1) that plaintiff has been pursuing his or her rights diligently, and 2) that some extraordinary circumstance stood in his/her way." See *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Johnson pursed his rights diligently from the moment he filed the lawsuit in 1998 in the Superior Court, until now in 2008. To understand the "extraordinary circumstance" that stood in Johnson's way, it would require the Supreme Court to read the 106 page Amended Complaint, and to hear about the crushing poverty inflicted on

Johnson that was the result of the "attacks" on Johnson and his business by the District of Columbia, it's police officers, and its attorneys who committed "fraud upon the court".

Tony Lee and McGuireWoods LLP simply did not want to purse Johnson's claims, because of the fact that Johnson is a White man of mixed racial ancestry. Moreover, they did not due for Kenneth W. Johnson what they have done for their other clients. Tony Lee used the long handled spoon in dealing with Kenneth W. Johnson from the very beginning of the relationship. First he signed the name of another attorney, that Johnson has never even met, to the retainer agreement right in front of Johnson's face, then after Johnson protested, he still would not sign his entire name, "Tony S. Lee" but would only sign his initials "T.S.L." to the retainer. He engaged in racial discrimination towards Johnson: See the Amended Complaint at pages 51-61 and the Amended Complaint at pages 68-79.

The United States Court of Appeal's January, 23, 2008 Orders completely ignore the fact that Johnson filed a timely Rule 60(b) "Motion to Vacate Prior Judgment", which also asked for leave to amend the Amended Complaint pursuant to Rule 15(a) and (c) as well as the Supreme Court precedent in *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222. The United States Court of Appeals reviewed Johnson's 6/9/2006 Amended Complaint ***de novo***.

"Ordinarily, post judgment amendment of a complaint requires reopening of the judgment"—*Building Industry Ass'n of Superior California v. Norton*, 247 F.3d 1241. Fed.Rules.Civ.Proc.Rules 15(a), 59(e), 60(b), 28 U.S.C.A. Johnson's motions to vacate prior judgment and for leave to amend the Amended Complaint should have been granted. The Supreme Court precedent in ***Foman v. Davis***, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222 establishes that "....district court abused its discretion in denying motion to amend complaint to assert right of recovery.... after dismissal of complaint." See also *Harrison v. Rubin*, 174 F.3d 249, 252 (D.C. Cir. 1999). Johnson wants appointed counsel to explain to the Supreme Court the reason that would justify relief from the operation of the September 19 or 20, 2006 Judgment.

Furthermore, the U.S. District Court in *Johnson v. Gadson* et al 06-22(RWR) *held*: Defendants also argue that issue preclusion and the statute of limitations should bar this action. These contentions are without merit. Issue preclusion does not apply here because the events giving rise to the claims against the moving defendants have never before been litigated. The three-year D.C. statute of limitations on personal injury claims, D.C. Code § 12-301(8), which applies here by operation of a Supreme Court decision, *Owens v. Okure*, 488 U.S. 235, 249-50(1989), does not bar this action because Johnson filed this action on January 9, 2006, complaining of events that occurred no earlier than January 15, 2003. See also *Carter v. District of Columbia*, 14 F.Supp. 2d 97,

102 (D.D.C. 1998)(stating that plaintiffs in this court "have the right to bring a Section 1981 or a Section 1983 claim at any time within three years of the alleged discrimination").

Johnson should have been granted relief from the October 9, 2007 JUDGMENT; the fact that United States Court of Appeals for the District of Columbia Circuit did not grant Johnson relief from the October 9, 2007 Judgment on or before January 23, 2008 constitutes a denial of equal protection of law and equal benefit of law.

CONCLUSION

For the reasons set forth herein, Johnson asks the Supreme Court of the United States to grant this "Petition for Writ of Certiorari to Review the Two January 23, 2008 ORDERS of the United States Court of Appeals for the District of Columbia Circuit, and asks the Supreme Court to mandate that "the Petition for Rehearing Pursuant to FRAP 40, the Petition for Rehearing En Banc, and the Motion for the Appointment of an Attorney for Appellant" all filed in the United States Court of Appeals for the District of Columbia Circuit on October 16, 2007, November 6, 2007, and October 23, 2007 in the case of Johnson v. Gadson et al., 06-7171 and 06-7204 be certified and transferred to the Supreme Court of the United States for review.

Kenneth W. Johnson 3/23/2008
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON; TONY S. LEE; HERBERT N. HARMON; ROBERT F. CONDON; ELBERT SHORE; AND MCGUIREWOODS LLP,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

APPENDIT TO PETITION FOR WRIT OF CERTIORARI TO REVIEW THE TWO JANUARY 23, 2008 ORDERS

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